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Probable Cause / Dog Sniff / Fifth Amendment

- **Eighth Circuit finds probable cause for seizure of currency based on quantity of currency, unusual packaging, use of fabric-softener sheets to disguise odor, Claimant's false statements, and other factors.**

- **District court properly disallowed testimony of expert witness who was prepared to say that "99 percent" of U.S. currency is contaminated and that therefore a positive dog sniff has no value; the expert did not account for the drug dog's failure to alert when presented with a "control" sample of currency taken from the pockets of the arresting officers.**

- **If Claimant asserts that the seized money came from a legitimate business, it is proper cross-examination to ask Claimant if he paid any federal income taxes on the business profits, even if the question prompts Claimant to take the Fifth Amendment.**

State police stopped a vehicle for a traffic violation. When the officer detected a strong odor of fabric-softener sheets, he conducted a consent search and found $141,770 in U.S. currency concealed in a false compartment in the vehicle's roof. The Government filed a civil forfeiture action under 21 U.S.C. § 881(a)(6) to which Claimant objected on the ground that the Government lacked probable cause to believe that the money was drug proceeds. In a 2-1 decision, the **Eighth Circuit** upheld the forfeiture.

The panel acknowledged that the Government has the burden of showing that the money was derived from drug trafficking and not from some other criminal offense. However, the court found the following factors persuasive in establishing probable cause under section 881(a)(6): (1) the large amount of cash; (2) a positive alert by a drug dog; (3) the passengers' itinerary (they were transporting cash from the Midwest to California, a drug-source state); (4) the manner in which the currency was concealed and packaged (three layers of zip-lock bags, wrapped in fabric-softener sheets to conceal the odor of a controlled substance, and hidden in the roof of the vehicle); (5) Claimant's false story that he had brought the money *from* California (receipts in his pockets showed that he purchased the zip-lock bags in Minnesota); and (6) Claimant's initial denial of ownership which contradicted his later assertion that the money came from a legitimate business.

Claimant attempted to rebut the evidence regarding the positive dog sniff by offering the testimony of an expert witness. The expert was prepared to impeach the reliability of the dog sniff by testifying that "99 percent" of U.S. currency is tainted with a controlled

substance. But the court disallowed the expert testimony, both because the witness' methodology was flawed (he had sampled an extremely small amount of money without adequate scientific controls) and because the testimony did not rebut the Government's key point.

In introducing the evidence of the positive dog alert, the Government established that the same dog had failed to alert to a similar sample of currency drawn from the pockets of the state police officers engaged in the seizure. This evidence, the court held, created an inference that the dog was able to distinguish between currency that has been exposed to a significant quantity of a controlled substance and currency that has not. Even if the expert were correct in concluding that "99 percent" of all currency has some amount of contamination, the court said, that does not mean that all currency is contaminated to such a degree that the drug dog will necessarily alert to it. Indeed, the Government's evidence showed that the opposite was true. "Because [the expert] was not prepared to testify as to the level of contamination which must exist before a drug-sniffing dog will alert to currency, or as to the percentage of United States currency which contains this requisite level of contamination, the trial court was justified in concluding that his testimony would tend to confuse rather than aid the trier of fact."

Claimant also objected to the Government's cross-examination with respect to his assertion that the money came from a legitimate source. When Claimant testified, he asserted that the money was derived from an auto body business. The Assistant U.S. Attorney (AUSA) then asked Claimant if he had paid any federal income tax on any of the alleged business profits between 1990 and 1994. In response, Claimant asserted his Fifth Amendment right against self-incrimination.

On appeal, Claimant argued that the AUSA's cross-examination was improper in that it forced Claimant to assert his Fifth Amendment right in the presence of the jury. But the court held that it was Claimant, not the Government, who had opened the door to this inquiry when he claimed that the seized money came from his auto business. Therefore, the district court acted properly in permitting the cross-examination. —*SDC*

United States v. $141,770.00 in U.S. Currency, ___ F.3d ___, No. 972393, 1998 WL 684577 (8th Cir. Oct. 5, 1998). Contact: AUSA Nancy A. Svoboda, ANE01(nsvoboda).

Comment: The courts remain split on the quantum of evidence needed to establish probable cause that currency seized from a courier is drug proceeds. In particular, they remain divided over the probative value of a positive dog sniff. This case should become one of the leading appellate cases on both issues. To get a flavor of the division in the courts, compare the following cases.

Cases where the Government established probable cause: United States v. $129,727.00 U.S. Currency, 129 F.3d 486 (9th Cir. 1997) (drug courier profile provided adequate basis for investigative stop, and once bags were opened, large quantity of cash and manner of packaging—bundles wrapped in fabric softener sheets and plastic wrap—provided probable cause); *United States v. One Lot of U.S. Currency ($36,674)*, 103 F.3d 1048 (1st Cir. 1997) (dog sniff, defendant's connection to known criminals, quantity of cash, itinerary of air travel, and evasive answers to questions all add up to probable cause); *United*

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States v. Carr, 25 F.3d 1194 (3d Cir. 1994) (dog sniff supports finding that laundered cash is drug proceeds); *United States v. $39,873.00*, 80 F.3d 317 (8th Cir. 1996) (dog sniff, packaging of currency, and proximity to drug paraphernalia provided sufficient probable cause for seizure of currency during highway stop); *United States v. $189,825.00 in U.S. Currency*, 8 F. Supp. 2d 1300 (N.D. Okla. 1998) (courier profile and travel on highway known as a "drug pipeline," unique packaging and placement of money in gas tank, implausible story, and dog sniff established probable cause); *United States v. $86,020.00 in U.S. Currency*, 1 F. Supp. 2d 1034 (D. Ariz. 1997) (discounting dog sniff, the Government nevertheless established probable cause based on large quantity of cash, use of assumed name, and other courier "profile" factors); *United States v. $9,135.00 in U.S. Currency*, 1998 WL 329270 (E.D. La. June 18, 1998) (courier profile: nervous behavior and absence of luggage; bundling of currency in pockets and shoes; implausible story; dog sniff; and lack of sufficient legitimate income together established probable cause); *United States v. $8,880*, 945 F. Supp. 521 (W.D.N.Y. 1996) (claimant with history of drug trafficking buys airline tickets with cash using false name, carries no luggage, and refuses to show photo identification to ticket agent); *United States v. $206,323.56 in U.S. Currency*, 998 F. Supp. 693 (S.D.W. Va. 1998) (claimant's flight during highway stop, dog sniff, presence of marijuana and weapons, quantity of currency, and manner of bundling established probable cause); *United States v. $94,010 U.S. Currency*, 1998 WL 567837 (W.D.N.Y. Aug. 21, 1998) (false story about destination, concealment of cash in false compartment, and alert by drug dog showed the Government had sufficient evidence to satisfy particularity requirement in Rule E(2)(a); dog sniff is probative evidence in the Second Circuit).

Adverse decisions on cash seizures: United States v. $30,060, 39 F.3d 1039 (9th Cir. 1994) (dog sniff not probative where 75 percent of currency in the community is contaminated); *United States v. $49,576.00 in U.S. Currency*, 116 F.3d 425 (9th Cir. 1997) (seizure of cash at airport lacked probable cause despite dog sniff, evasive answers, fake identification, courier profile, and prior drug arrest); *United States v. $13,570.00 in U.S. Currency*, 1997 WL 722947 (E.D. La. Nov. 18, 1997) (same); *United States v. $14,876.00 in U.S. Currency*, 1997 WL 722942 (E.D. La. Nov. 18, 1997) (same); *United States v. $40,000 in U.S. Currency*, 999 F. Supp. 234 (D.P.R. 1998) (dog sniff, drug courier profile, quantity of currency, and evasive answers are not sufficient to establish probable cause where the Government fails to establish any connection between claimant and any drug trafficker).

—*SDC*

Summary Judgment / Probable Cause / Dog Sniff

■ **District court declines to grant Claimant's motion for summary judgment where Claimant suggested that a positive dog sniff was unreliable as a matter of law.**

Police officers in a marked police vehicle stopped Claimant for apparently driving while intoxicated. The Government subsequently commenced a civil forfeiture action alleging that there was probable cause to believe that $13,900 in U.S. currency seized during the stop was property connected to drug related activity.

Claimant moved for summary judgment, and in doing so carried the burden of demonstrating an absence of evidence in support of the Government's case. The Government presented the following factors to suggest the defendant money was related to drug activity: (1) Claimant's possession of a gun; (2) the manner in which the money was found—that is, wrapped in small bundles, in varying denominations and held together by rubber bands; (3) Claimant's false statements to the police about the source of the money; and (4) a positive response by a trained narcotics dog to the presence of traces of controlled substances on the money at the time of seizure.

Although not denying the Government's allegations, Claimant argued that the Government's evidence was "unreliable" and that the factors were insufficient to indicate any connection between the money and drug related activity. Claimant specifically argued that

numerous courts discounted the accuracy of using dogs to indicate the presence of traces of drugs on money. The Government, citing to contrary case law, argued that it was able to demonstrate the extensive training and strong record for locating drugs specific to the particular police dog.

The court denied summary judgment on the basis that Claimant failed to prove an absence of a factual dispute. —*WJS*

United States v. $13,900 in U.S. Currency, No. CIV-A-98-0476, 1998 WL 564312 (E.D. La. Aug. 27, 1998) (unpublished). Contact: AUSA Dahil Goss, AGAN02(dgoss).

Probable Cause / Airport Stop / Standing

- **Totality of the circumstances establishes that a 21-year-old drop-out with no source of income, traveling with $263,000 in street money in a carry-on bag, and having associations with known drug dealers is a courier carrying drug money.**

- **In the Eleventh Circuit, probable cause is established at the end of the Government's investigation, not at the time the complaint is filed.**

- **Courier who claims the money belongs to her has more than "naked possession," and thus has standing to contest forfeiture.**

Claimant, a 21-year-old college drop-out with limited income and resources, was stopped in the Atlanta airport because she fit the drug-courier profile. Upon a search of her carry-on bags, law enforcement agents discovered $263,448 in U.S. currency, all packaged as "street money" in bundles with rubber bands. Claimant claimed that money came from a legitimate business and that the purpose of her trip—to St. Thomas in the Virgin Islands—was to look for business opportunities, but she became nervous and evasive when pressed for details. She also stated that she planned to visit relatives in St. Thomas—a statement which turned out to be false.

Aside from a positive dog sniff, there was no evidence connecting the money to drug trafficking, but Claimant had several close associates who were known or convicted drug dealers.

The Government filed a civil forfeiture action against the currency under 21 U.S.C. § 881(a)(6) and sought information regarding the source of the money from Claimant in civil discovery. Claimant responded to all such requests by invoking her Fifth Amendment right against self-incrimination. The Government then moved for summary judgment. Based on the totality of the circumstances, the district court agreed that the Government had established probable cause and that Claimant had failed to establish a legitimate source for the currency. Accordingly, the court entered summary judgment for the Government.

As a threshold matter, the court had to determine if Claimant had standing to contest the forfeiture. The court noted that naked possession of illegal proceeds is not a sufficient basis for Article III standing. However, where a claimant has asserted that the property seized from her possession belongs to her and comes from a legal source, she has asserted enough to establish standing to contest the forfeiture. Thus, the court overruled the Government's objections to Claimant's standing.

Next, the court had to determine whether, in evaluating the Government's probable cause, it should be limited to the evidence in the Government's possession at the time it filed the complaint, or should consider all evidence obtained by the Government through subsequent investigation. The court held that, while the Ninth Circuit limits the Government to evidence obtained before the complaint is filed, it was required to follow Eleventh Circuit law, which is to the contrary. Therefore, the court considered all of the Government's after-acquired evidence.

That evidence included the following facts: (1) Claimant took the Fifth Amendment in response to questions in her deposition; (2) Claimant was traveling

on a one-way ticket purchased with cash less than an hour before departure; (3) Claimant checked no luggage and carried only money and one change of clothes in her carry-on bags; (4) Claimant was traveling to a "source city" for narcotics distribution; (5) Claimant gave false and evasive answers when asked the purpose of her trip; (6) a drug dog alerted to the currency; (7) Claimant was carrying an extremely large amount of money in street denominations and wrapped in rubber bands; (8) Claimant's legitimate income for the previous several years was insufficient to explain how she had acquired over $263,000 at the age of 21; (9) Claimant was associated with at least two known drug traffickers who, like Claimant, frequently traveled to St. Thomas; (10) telephone records showed that Claimant had been in contact with the drug dealers shortly before the aborted trip to St. Thomas.

The court was most impressed with Claimant's lack of sufficient legitimate income to explain her possession of the seized money. "Where a claimant's verifiable income cannot possibly account for the level of wealth displayed and where there is strong evidence that the claimant is a drug trafficker, then there is probable cause to believe that the wealth is either the direct product of illicit activity or that it is traceable to the activity," quoting *Two Parcels of Real Property Located in Russell County*, 868 F. Supp. 306 (M.D. Ala. 1994), *aff'd*, 92 F.3d 1123, 1128 (11th Cir. 1996). Thus, the court found that the Government had established probable cause.

Moreover, the court held that Claimant's failure to produce credible evidence to show legitimate ownership of the money meant that the Government was entitled to summary judgment not only as to probable cause, but as to Claimant's affirmative defense as well. —*SDC*

United States v. $263,448.00 in U.S. Currency, No. 1:96-CV-284-HTW (N.D. Ga. Sept. 24, 1998) (unpublished). Contact: AUSA Dahil Goss, AGAN02(dgoss).

Comment: This case is an excellent illustration of how thorough post-seizure investigation can turn a thin circumstantial case into a compelling argument for summary judgment. Claimant's employment history, lack of legitimate income, failure to file tax returns, past travel to St. Thomas, phone records, associations with drug traffickers, invocation of the Fifth Amendment, and the non-existence of any relatives Claimant might have intended to visit on her trip, were all factors unknown at the time of the seizure but developed later. —*SDC*

Motion to Dismiss / Probable Cause / Particularity / Dog Sniff

■ **In currency courier / dog sniff case, Claimant's Rule 12(b)(6) motion to dismiss forfeiture complaint for lack of particularity denied. Court holds that the factors set forth in the Government's complaint meet the stringent pleading requirements of Supplemental Rule E(2).**

Claimant and two companions tried to enter the United States from Canada by driving over the Rainbow Bridge at Niagara Falls, New York. At the border inspection station, inspectors questioned them and searched the vehicle, finding $94,010 in small bills concealed in a compartment behind the glove box. When given the Customs Declaration Form, Claimant admitted transporting the currency, but claimed it represented personal savings and proceeds from an automobile sale that he intended to give to his mother for the purchase of a home.

All three individuals separately stated that were traveling to New York City to attend a wedding. However, upon further search of the vehicle, inspectors discovered an airplane ticket issued in the name of one of Claimant's companions for travel that same day from Buffalo to Ft. Lauderdale, returning one week later. The companion later admitted that he had lied about his true destination.

A drug dog gave a positive alert on the currency for

the presence of narcotics, and an IONSCAN Narcotics Plasmagram gave a "positive high reading" for the presence of cocaine residue on the currency and on the dashboard. Accordingly, the Government filed a forfeiture complaint pursuant to 21 U.S.C. § 881 against the seized currency. Claimant moved to dismiss pursuant to Rule 12(b)(6), alleging that the complaint failed to comply with the particularity requirements set forth in Supplemental Rule E(2).

The court denied the motion. The heightened pleading requirements in forfeiture cases are intended to ensure that the Government does not "seize and hold," for a substantial period, property to which it has no legitimate claim, the court said, but the particularity requirement does not require demonstration of probable cause in the complaint. Rather, the Government need only establish a "reasonable belief" that it will be able to show probable cause for forfeiture at trial. In this case, the court found that the aggregation of circumstantial evidence set forth in the complaint—the false story regarding the companion's destination, concealment of cash in a false compartment, and the alert by the drug dog—showed that the Government had sufficient evidence to satisfy the particularity requirement in Rule E(2)(a), "even if each piece of evidence might by itself be insufficient so to demonstrate."

Moreover, in response to Claimant's challenge to the validity of the dog sniff, the court held that a positive dog sniff is probative evidence of a connection to narcotics in the Second Circuit. The court also noted that the Customs agents further corroborated the dog's alert by the use of the IONSCAN. —*JRP*

United States v. $94,010.00 U.S. Currency, No. 98-CV-0171E(F), 1998 WL 567837 (W.D.N.Y. Aug. 21, 1998) (unpublished). Contact: AUSA Gregory L. Brown, (ANYW01) (gbrown).

Motion to Dismiss / Particularity

■ **To withstand a motion to dismiss a civil forfeiture complaint, the Government need only show that it meets the particularity standard in Rule E(2) of the Supplemental Rules.**

■ **Where a complaint alleges that real property is traceable to drug trafficking and is forfeitable under 21 U.S.C. § 881(a)(6), allegation that the claimant made mortgage payments on the property while deriving substantial income from a marijuana grow operation is sufficient to support a reasonable belief that the Government will be able to establish probable cause at trial.**

The Government filed a civil forfeiture action against several parcels of real property used to facilitate a marijuana grow operation or purchased with the proceeds of such operation. Claimants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

In its opinion denying the motion, the district court provides an excellent discussion of the standards that govern a motion to dismiss in a civil forfeiture case. First, the court notes that all factual allegations in the complaint must be presumed to be true, and that a motion to dismiss should be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."

Moreover, the court held that the Government's burden at the pleading stage is governed by Rule E(2) of the Supplemental Rules. Under Rule E(2), the Government is not required to meet its burden of proof at trial at the pleading stage, but rather is required only to allege facts sufficient to support "a reasonable belief" that the Government will be able to meet its burden at trial. Accordingly, the Government is not required to establish probable cause in its complaint, but is required only to demonstrate reasonable grounds to believe that it will be able to establish probable cause at trial.

The requirements in Rule E(2), the court continued, are sufficient to ensure that the Government "does not seize and hold, for a substantial period of time, property to which, in reality, it has no legitimate claim."

Turning to the merits of the motion to dismiss, the court held that the allegations in the complaint were sufficient to satisfy Rule E(2). Specifically, the Government alleged that the claimants acquired the real property by making mortgage payments at a time when they were drawing substantial income from their illegal marijuana operation. This was sufficient to support a reasonable belief that the Government could establish probable cause for the forfeiture at trial.

—SDC

United States v. One Parcel . . . 2556 Yale Avenue, ___ F. Supp. 2d ___, 1998 WL 661347 (W.D. Tenn. Sept. 17, 1998). Contact: AUSA Christopher Cotten, ATNW01(ccotten).

Comment: The court collects cases from the Sixth Circuit and elsewhere in support of its discussion of the standard governing a motion to dismiss a civil forfeiture complaint. Thus, the case is a useful resource on this topic. Note that Ninth Circuit law is to the contrary. *See United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994) (construing 19 U.S.C. § 1615 to require the Government to have probable cause at the time it files its complaint or suffer dismissal). But all three of the foregoing decisions—*$263,448*, *$94,010*, and *2556 Yale Ave.*—explicitly reject application of that case outside of the Ninth Circuit.

—SDC

Pretrial Restraining Orders / Interlocutory Appeal / Criminal Forfeiture Procedure

- **When Congress incorporated the procedures for criminal forfeiture from 21 U.S.C. § 853 into 18 U.S.C. § 982(b)(1), it intended that those procedures would apply in all money laundering cases, not just those involving drugs.**
- **Congress has amended section 982(b)(1) to incorporate the same procedures from section 853 for all forfeitures under section 982(a).**
- **Defendants in the Seventh Circuit may challenge a post-indictment, pretrial restraining order on the ground that the money is needed to retain counsel only if they demonstrate that they lack other funds with which to pay counsel.**
- **Whether a defendant in the Seventh Circuit may challenge a post-indictment restraining order on grounds unrelated to the Sixth Amendment right to counsel, or must wait until trial to challenge the forfeiture, is an open question.**
- **District court may not use a pretrial restraining order in a criminal case to enjoin the actions of third parties; to the extent that an order restrains the actions of a defendant's wife, it is void; but, if the court finds that the property really belongs to the defendant and it enjoins only the defendant's actions, it is proper.**
- **Whether a third party can challenge a pretrial restraining order on the ground that the property really belongs to her is an open question in the Seventh Circuit.**

Defendant ran a hospice service for which he billed Medicare and Medicaid. The Government alleged that over $20 million of Defendant's billings were fraudulent and had been laundered in violation of 18 U.S.C. § 1957.

To preserve Defendant's assets for forfeiture, the

Government first obtained a pre-indictment restraining order under 21 U.S.C. § 853(e)(1)(B), as incorporated by 18 U.S.C. § 982(b)(1). In support of its request for the restraining order, the Government asserted that $20 million in the defendant's bank accounts was "property involved in" a money laundering offense and was therefore subject to forfeiture under section 982(a)(1)(A). The court issued the pre-indictment order *ex parte*. Subsequently, Defendant moved to vacate the order and the Government simultaneously moved to extend the order for 90 days. The court conducted an evidentiary hearing and granted the Government's motion.

Within the 90-day period, the grand jury returned an indictment charging Defendant with various offenses, including violations of section 1957. The indictment included a criminal forfeiture allegation under section 982(a)(1)(A). The Government then obtained a new *ex parte* restraining order, this time under section 853(e)(1)(A), restraining the previously restrained funds in Defendant's bank accounts, as well as other property, for the duration of the trial.

Defendant objected to the post-indictment restraining order on several grounds. First, he argued that section 853(e) is incorporated into section 982 only for drug cases, and therefore may not be applied in a money laundering case based on health care fraud. Second, he argued that he needed to use the frozen assets for attorneys' fees, and that the Government was required to establish probable cause to believe the property was subject to forfeiture. Finally, Defendant's wife objected to the restraint of any property held in her name on the ground that criminal forfeiture orders cannot affect the rights of third parties. The district court rejected all of these arguments. On appeal, the **Seventh Circuit** affirmed as to Defendant's arguments. It agreed that the restraining order could not enjoin the actions of Defendant's wife, but it held that because the property in question actually belonged to Defendant, the restraining order only applied to him.

As a threshold matter, the court ruled that the district court's denial of Defendant's objections to the pre-trial restraining order was properly the subject of an interlocutory appeal under 28 U.S.C. § 1292(a)(1). The panel surveyed the case law on the subject and found the other courts to be virtually unanimous in this regard.

Turning to Defendant's first point, the court acknowledged that section 853(e), by its terms, applies only to drug cases. But the court held that when Congress said, in section 982(b)(1), that forfeitures under section 982(a) "shall be governed by" certain provisions of section 853, it meant that courts in section 982 cases would use the *procedures* set forth in section 853; it did not mean that the procedures were incorporated only in section 982 cases that involved drugs. The "shall be governed by" language, the court said, was simply a short-hand way of applying procedures from another area of the U.S. Code without reproducing them in a subsequently-enacted statute. Thus, the district court had the authority to restrain the money in Defendant's bank accounts as property involved in a money laundering offense, even though the offense involved the laundering of health care fraud proceeds, not drug proceeds.

The court then turned to Defendant's due process challenge to the post-indictment restraining order. First, the court noted the difference between the language in section 853(e)(1)(B), regarding pre-indictment restraining orders, and the language in section 853(e)(1)(A) regarding post-indictment orders. The former provision guarantees the defendant a post-restraint hearing, but the latter provision does not. Thus, with respect to the post-indictment restraining order, before addressing Defendant's challenge to the adequacy and scope of the hearing he was afforded, the court had to determine whether Defendant was entitled to any hearing at all.

The court noted that, in grounding his challenge to the restraining order on his need for funds to retain counsel, Defendant had conflated two separate issues: (1) whether a defendant is entitled to a post-restraint hearing in cases where he needs the money to preserve his Sixth Amendment right to counsel; and (2) whether a defendant is otherwise entitled to a hearing in cases where the Sixth Amendment is not involved. The **Seventh Circuit** has previously held, on the first point, that the district court must afford the defendant a post-restraint hearing if he raises the Sixth Amendment issue. *See United States v. Moya-Gomez*, 860 F.2d 706, 729 (7th Cir. 1988). But this applies, the court held, only if the defendant can show that he lacks other funds with which to hire counsel. Because Defendant in this case had consistently failed to satisfy the district court that he lacked other funds, he was not entitled to challenge the post-indictment

restraining order on the grounds set forth in *Moya-Gomez*.

Pertaining to the second ground for a post-restraint hearing, the court surveyed the case law and found that the circuits are divided on the issue of whether a defendant is entitled to a post-restraint hearing when the Sixth Amendment issue is not implicated. *See* comment, *infra*. But the court avoided having to resolve this issue by holding that Defendant had not properly preserved it for appeal. Thus, the court said, whether a defendant in the **Seventh Circuit** may challenge a post-indictment restraining order on grounds unrelated to the Sixth Amendment, or must wait until trial to challenge the forfeiture, is an open question that will be left to another day.

Finally, the panel addressed Defendant's wife's objection to the restraint of property held in her name. The court began by holding that courts in criminal forfeiture cases are prohibited from issuing restraining orders that enjoin the acts of third parties. Under 853(e), the court held, the district court may only enjoin the acts of the defendant, his agents, and those acting in concert with him. Because Defendant's wife was not a party to the criminal case, the court had no personal jurisdiction over her, and could not enjoin her from doing anything. To the extent that the restraining order attempted to restrain the actions of the wife, it was void.

However, the court continued, the restraining order did not enjoin the wife from doing anything. To the contrary, it merely enjoined *the defendant* from disbursing certain assets to his wife. In crafting that part of the restraining order, the district court had found that the property held in the wife's name was actually the defendant's property, and so could be forfeited in the criminal case. In challenging the restraining order, the wife did not challenge this finding of ownership. Therefore, the only issue before the court was whether the district court could enjoin the defendant from transferring property that it found to belong to the defendant. Certainly the district court had the authority to do that. So, while the language in the restraining order enjoining the defendant's wife was void, the order remained in effect with respect to Defendant and his control over the assets subject to forfeiture. Whether Defendant's wife could have challenged the district court's finding that Defendant was the owner of the restrained property is another question that the panel left for another day. —*SDC*

United States v. Kirschenbaum, 156 F.3d 784 (7th Cir. 1998). Contact: AUSA Michelle Fox, AILN02(mfox).

Comment: This case serves as a good example of how the Government may use the pre-indictment and post-indictment restraining order provisions in section 853(e) to preserve a defendant's assets for forfeiture. It also addresses a great number of recurring questions on which there is little case law.

First, as noted by the panel in this case, the courts are unanimous in holding that a defendant is entitled to a post-restraint hearing if he demonstrates that he needs the restrained funds to preserve his right to counsel under the Sixth Amendment. *See United States v. Monsanto*, 924 F.2d 1186, 1195-97 (2d Cir. 1991); *United States v. Crozier*, 777 F.2d 1376, 1383-84 (9th Cir. 1985); *United States v. Moya-Gomez*, 860 F.2d 706, 729 (7th Cir. 1988); *United States v. Thier*, 801 F.2d 1463, 1469 (5th Cir. 1986). But they are split over whether a hearing is required when the defendant's challenge is not based on the Sixth Amendment. *Monsanto* and *Crozier*, to give two examples, appear to hold that a defendant has a Fifth Amendment right to a post-restraint hearing whether his objection to the restraining order is based on the Sixth Amendment or not. But the Tenth and Eleventh Circuits hold otherwise. *See United States v. Bissell*, 866 F.2d 1343, 1354 (11th Cir. 1989); *United States v. Musson*, 802 F.2d 384, 387 (10th Cir. 1986); *United States v. Nichols*, 841 F.2d 1485, 1491 n.4 (10th Cir. 1988) (leaving open question whether hearing is required if Sixth Amendment issue is raised); *United States v. St. Pierre*, 950 F. Supp. 334 (M.D. Fl. 1996) (following *Bissell*; defendant has ample opportunity to challenge forfeiture at trial); *In Re Protective Order*, 790 F. Supp. 1140 (S.D. Fla. 1992). Another case raising this issue is currently pending in the Tenth Circuit.

Next, the court deals with a set of troublesome issues involving the pretrial restraint of property held by third parties. The majority view is that property held by third parties may be restrained pre-trial if such restraint is necessary to preserve the Government's interest in the portion of the property that is held by the defendant and which is therefore

subject to forfeiture. *See United States v. Jenkins*, 974 F.2d 32 (5th Cir. 1992); *In Re Billman*, 915 F.2d 916 (4th Cir. 1990); *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988); *United States v. BCCI Holdings (Luxembourg) S.A. (Application of Clifford and Altman)*, 980 F. Supp. 496 (D.D.C. 1997) (pursuant to section 1963(e), court may appoint trustee to liquidate assets of corporation where such liquidation is necessary for gov't to realize defendant's 61 percent interest); *id.* (court may order non-forfeitable portion of restrained property held in escrow to preserve status quo until competing third-party claims are resolved in a separate case); *United States v. Brandino*, No. 95-626-CR-RYSKAMP (S.D. Fla. Jun. 27, 1997) (unpublished) (court may authorize Government to take control of non-defendant corporation and manage its business, or permit third parties to run the business under the supervision of a court-appointed conservator; proceeds of restrained business remain in escrow pending the ancillary proceeding); *but see United States v. Riley*, 78 F.3d 367 (8th Cir. 1996) (court may *not* appoint receiver to operate corporation where only the defendant's interest in the corporation, not corporation itself, is subject to forfeiture). In holding that the district court *may not* enjoin the acts of third parties, the Seventh Circuit panel explicitly declined to follow *Regan*, creating a split in the circuits on this issue.

Note, however, that the Seventh Circuit did not hold that third parties are free to ignore restraining orders enjoining the acts of the defendant. A third party who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt, the court said. For this reason, it still makes sense in the Seventh Circuit to make sure that third parties are given notice of a restraining order served on the defendant.

Also troubling is the court's discussion of the third party's right to challenge a pretrial restraining order on the ground that the property really belongs to her and not to the defendant. Most courts that have addressed the issue hold that a third party has the right to challenge a pre-trial order that restrains *her property*. *See Roberts v. United States*, 141 F.3d 1468 (11th Cir. 1998) (if third party's property is restrained pretrial and the defendant is a fugitive, the third party's remedy is to ask the court that issued the order to amend it, and file an interlocutory appeal if unsuccessful); *United States v. Real Property in Waterboro*, 64 F.3d 752, 756 (1st Cir. 1995) (third party may participate in the restraining order proceeding); *United States v. Wu*, 814 F. Supp. 491, 495 (E.D. Va. 1993) (discussing legislative history and fairness of allowing third party to contest restraining order); *United States v. Scardino*, 956 F. Supp. 774 (N.D. Ill. 1997) (third party entitled to challenge filing of pretrial *lis pendens* on property held in her name). But, in the Government's view at least, such challenges are limited to procedural issues, such as whether the restraining order is creating a hardship and whether the Government's interest may be preserved through less intrusive means. Under this view, challenges to the district court's preliminary determination of ownership must await the ancillary proceeding. *But see United States v. Siegal*, 974 F. Supp. 55 (D. Mass. 1997) (defendant's family members entitled to challenge restraining order on the ground that the property belonged to them where criminal trial would not commence for another six months).

Finally, in rejecting the defendant's argument that section 982(b)(1) incorporated the provisions of section 853 only for drug cases, the Seventh Circuit noted that Congress had incorporated different subsections of section 853 for different parts of section 982(a). For example, section 982(b)(1) incorporated one set of section 853 provisions for forfeitures under section 982(a)(1), (6), and (8), another set for forfeitures under section 982(a)(2), a third set for forfeitures under section 982(a)(7), and no procedures at all for forfeitures under section 982(a)(3)-(5). In the court's view, this "carefully considered" scheme would be rendered meaningless if the provisions of section 853 applied only in drug cases.

The court makes a valid point, but happily its holding does not turn on the convoluted language in section 982(b)(1). That is because Congress, after being urged by the Justice Department to do so for many years, has finally amended section 982(b)(1) to read as follows:

> The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of

section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 853). This means that there are now procedures for *all* of the forfeitures authorized by section 982(a), and that, with one exception, the procedures are uniform. The exception is created by the fact that section 982(a)(7) contains its own set of procedures for INS cases. A future technical amendment will be needed to remove that provision so that the global provision in section 982(b)(1) applies. Of course, section 982(a)(7) itself is, for the most part, unenforceable because of drafting errors and needs to be amended. One hopes that both amendments can be made at the same time.

The effective date of the amendment to section 982(b)(1) is October 30, 1998. The amendment is found in H.R. 4151, Pub. L. No. 105-318, 105th Cong., 2d Sess. (1998). —*SDC*

Substitute Assets / *Lis Pendens* / Standing

- **In the Second Circuit, substitute assets may not be restrained or seized before conviction, but the Government can file a *lis pendens* on real property forfeitable as a substitute asset since it does not constitute a "restraint" or "seizure."**
- **Defendants who claim property is not owned by them, but by a third party, lack standing to raise this issue on behalf of the third party, and the third party cannot raise it until the ancillary proceeding.**

In a money laundering case, the Government sought criminal forfeiture of $700 million under 18 U.S.C. § 982 and seized certain property to be forfeited as substitute assets. The court held that the prohibition on pretrial *restraint* of substitute assets in the Second Circuit applies equally to *seizure* before conviction pursuant to 21 U.S.C. § 853(f), and ordered the Government to return to each defendant any substitute assets it had seized.

However, the court also stated that its decision did not affect the Government's filing of a *lis pendens* on real properties as substitute assets because the filing does not constitute a "restraint" or "seizure" within the meaning of 21 U.S.C. § 853(e) or (f).

Finally, two of the defendants objected to a pre-trial restraining order on the ground that the property was actually owned by a third party—an Indian tribe. The court held that the two defendants lacked standing to raise this issue on behalf of the tribe, and the tribe itself could not challenge the forfeiture until the ancillary proceeding. —*HSL*

United States v. Miller, ___ F. Supp. 2d ___, No. 97-CR-199, 1998 WL 709469 (N.D.N.Y. Oct. 7, 1998). Contact: AUSA Gregory A. West, ANYN01(gwest).

Comment: It appears well-established that the power of the Government to *seize* property as substitute assets pretrial is co-extensive with its power to *restrain* such property pretrial. *See United States v. Schmitz*, 156 F.R.D. 136 (E.D. Wis. 1994) (the Government can seize the same property under section 853(f) that it can restrain under section 853(e), since substitute assets can be restrained, they can be seized); *but see United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993) (dicta) (because substitute assets are not subject to pretrial restraint, neither are they subject to seizure). —*SDC*

Substitute Assets

- **District court holds that criminal proceeds that are directly traced to defendant's bank account are not**

forfeitable as "property traceable to the offense" if the bank account also contains untainted funds.

- **However, the same facts that make the funds "untraceable" allow the court to order the forfeiture of the commingled property as substitute assets.**

- **The Supreme Court's decision in *Caplin & Drysdale*, which held that the defendant may not use forfeitable property for attorneys' fees, applies equally to property forfeitable as substitute assets.**

Defendant was engaged in a massive fraud scheme that resulted in the accumulation of $3 million in fraud proceeds in a bank account. Defendant withdrew the $3 million from that account and deposited the money in a second account. The Government charged that the withdrawal constituted an offense under 18 U.S.C. § 1957, and sought the forfeiture of the money (or the $2.6 million that remained) from the second account as property traceable to the money laundering offense.

Defendant was convicted of the 1957 offense, and the district court entered a personal money judgment against Defendant for the amount laundered. But the court declined to order the forfeiture of the $2.6 million that was traced to the second account. The court noted that at the time of the deposit of the laundered funds, the second account contained some untainted funds with which the laundered funds were then commingled. Relying on *United States v. Voight*, 89 F.3d 1050 (3d Cir. 1995), the court held that because of the commingling, the funds in the second account were not "traceable to" the money laundering offense, and thus were not subject to forfeiture under section 982(a).

The court went on, however, to rule that the same $2.6 million could be forfeited as substitute assets under section 853(p). That statute, the court held, permits forfeiture of substitute property if the Government shows that the defendant commingled laundered funds with other property so that the tainted and untainted funds cannot be divided without difficulty. *See* section 853(p)(5). Thus, the same facts that made it impossible, under the court's application of *Voight*, to forfeit the $2.6 million directly—the commingling of the laundered funds with untainted funds in the second account—established the basis for forfeiting the same $2.6 million as substitute assets.

Defendant objected to the forfeiture of substitute assets on the ground that he needed the money to pay attorneys' fees. But the court held that the Supreme Court's decision in *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), barred the use of any forfeitable property, including property forfeitable as substitute assets, for attorneys' fees. —*SDC*

United States v. Stewart, No. CRIM-A-96-583, 1998 WL 720063 (E.D. Pa. Oct. 6, 1998) (MEM). Contact: AUSAs Linda Dale Hoffa, APAE11(lhoffa), and James Ingram, AALN01(jingram).

Comment: There are two points that should be made regarding this otherwise favorable opinion. First, the court appears to misapply *Voight*. In that case, the defendant deposited $1.6 million in laundered funds into a bank account (which was charged as the money laundering offense), commingled the laundered funds with untainted funds in that account, and then used some of the funds in that account to purchase jewelry. The Government sought to forfeit the jewelry as property traceable to the money laundering offense, but the Third Circuit held that it was impossible to trace the forfeitable (laundered) funds through the commingled account to the jewelry. The jewelry could only be forfeited, the court held, as substitute assets.

Here, the Government traced the forfeitable (laundered) funds into the defendant's second bank account where it remained. The defendant may have commingled this money with other funds, but nevertheless there was no doubt that the account still contained the forfeitable funds. There was no issue, as there was in *Voight*, as to whether the tainted or untainted funds had been used to purchase the property the Government wanted to forfeit.

It seems that, if a defendant puts $100 in criminal proceeds in his bank account, the $100 is forfeitable from the bank account whether the same account contains other money or not. Once the tainted money is traced into the account, all the Government should have to show in support of its forfeiture request is that the money is still there.

Moreover, suppose the Government had charged the deposit of the $3 million into the second account as the money laundering offense. If the deposit of $3 million into a bank account is itself a money laundering offense giving rise to forfeiture, could a court still hold that the money in the account was not traceable to the offense?

In any event, given the district court's determination that the same money is forfeitable under a substitute assets theory, one might ask if it matters whether the $2.6 million was subject to direct forfeiture under section 982(a) or not. This brings us to the second point: it could matter a great deal if any third-party claims have been filed in the ancillary proceeding.

Under section 853(c) and (n)(6), third parties whose interest in forfeited property vested before the Government's interest vested may recover whether or not they took title to the property in good faith as bona fide purchasers. *See* section 853(n)(6)(A). On the other hand, third parties whose interest vested *after* the Government acquired its interest are subject to the relation back doctrine, and can only recover if they are bona fide purchasers (BFPs). *See* section 853(c) and (n)(6)(B). Thus, when the Government's interest vested is critical in determining what standard a third party must meet, and whether he or she will prevail.

It is clear from section 853(c) that the Government's interest in *directly forfeitable* property vests at the time of the offense. So, if defendant Stewart's $2.6 million were directly forfeitable, third parties who acquired an alleged interest after the offense occurred, such as Stewart's defense attorneys, could recover, if at all, only if they are BFPs under section 853(n)(6)(B). However, if the $2.6 million is forfeitable only as *substitute assets*, third parties may argue that the Government's interest did not vest until the property was actually forfeited. In that case, the third parties will assert that they have a right to recover under section 853(n)(6)(A) because their interests vested before the Government's, whether or not they are BFPs.

An article on when the Government's interest in substitute assets vests appeared in the *Asset Forfeiture News*, May/June 1995, at 9. —SDC

Administrative Forfeiture / Notice / Statute of Limitations / Excessive Fines

- **Although district courts generally lack jurisdiction over administratively forfeited property, they retain jurisdiction to correct procedural deficiencies such as inadequate notice in administrative forfeitures.**

- **When criminal proceedings have been completed, the court treats the Rule 41(e) motion as a civil complaint.**

- **Plaintiff's own motion made it clear that due process was satisfied by actual notice of the administrative forfeiture proceeding.**

- **Statute of limitations for a claim that property was forfeited improperly is 28 U.S.C. § 2401, which allows six years from accrual of the right of action to sue the United States.**

- **Claim for return of unlawfully seized property generally accrues on the date of seizure.**

- **Despite Supreme Court's ruling in *Bajakajian*, forfeiture of over $52,000**

in unreported currency about to be taken out of the United States was not so "grossly disproportional" to the gravity of the offense that it violates the Excessive Fines Clause.

Plaintiff was stopped by a U.S. Customs agent in August 1988, as she was about to board an international flight. She was advised concerning the currency reporting requirements for amounts in excess of $10,000 when departing the United States, but told the agent that she had only $5,000 with her. The agent's subsequent search discovered over $52,000 in undeclared U.S. currency secreted on Plaintiff's person and in her handbag. The Customs agent seized the currency for forfeiture.

Plaintiff pled guilty to carrying more that $10,000 in unreported currency of the United States, and was sentenced to twelve months probation. The U.S. Customs Service (USCS) administratively forfeited the seized currency in March 1990.

In August 1997, Plaintiff moved pursuant to Fed. R. Crim. P. 41(e), for return of the seized currency on the grounds that she had not received adequate notice of the administrative forfeiture proceeding in violation of her due process rights. Because the criminal proceedings had been completed, the court treated the Rule 41(e) motion as a civil complaint. *See Onwubiko v. United States*, 969 F.2d 1392, 1397 (2d Cir. 1992). The court also noted that, although district courts generally lack jurisdiction over administratively forfeited property, they retain jurisdiction to correct procedural deficiencies such as inadequate notice in administrative forfeitures. *Weng v. United States*, 137 F.3d 709, 713 (2d Cir. 1998) (summarized in the *Quick Release*, April 1998, at 12-13).

The court ruled that it was clear from the face of Plaintiff's motion that she had actual notice of the of the forfeiture proceedings. The motion admitted that Plaintiff knew that her property was with the USCS, and that she contacted the USCS and furnished the agency with affidavits concerning the ownership of some of the seized funds. In addition, the USCS' records indicated that Plaintiff had been provided with formal notice in 1998, and that Plaintiff was aware of and participated in the administrative forfeiture proceeding. She had filed several requests for extensions of time and a petition for remission with the USCS. The court concluded that due process had been satisfied because, even if the USCS had failed to provide Plaintiff with a formal notice of seizure, Plaintiff's actual knowledge of the seizure had afforded her full opportunity, of which she took full advantage, to claim the property before it was forfeited.

In addition, the court ruled that the applicable statute of limitations had run and required dismissal of Plaintiff's complaint for lack of subject matter jurisdiction. The court pointed out that in the Second Circuit the statute of limitations for a claim that property was forfeited improperly is 28 U.S.C. § 2401, which is jurisdictional and provides for a period of six years within which to sue the United States beginning from accrual of the right of action. The court pointed out that a right of action accrues when the claimant knows or has reason to know of the injury that is the basis for the claim, and that a claim for return of unlawfully seized property therefore generally accrues on the date of seizure. The court ruled that Plaintiff's cause of action arose when the currency was seized in 1988, and that, consequently, her 1997 complaint for its return was well beyond the six-year limitation of section 2401.

Lastly, the court noted that in *United States v. Bajakajian*, ___ U.S. ___, 118 S. Ct. 2028 (1998), the Supreme Court found that the forfeiture of $357,144 from a defendant who failed to report currency being exported would violate the Excessive Fines Clause of the Eighth Amendment. However, the court stated that it did not follow from that opinion that the forfeiture of $52,280 in this case was so "grossly disproportionate" to the gravity of Plaintiff's offense that it violates the Excessive Fines Clause, and the court expressly held that it did not. —*JHP*

Olabisi v. United States, ___ F. Supp. ___, No. 97-CV-5219(ILG), 1998 WL 661459 (E.D.N.Y. August 17, 1998). Contact: AUSA Gail A. Matthew, ANYE12(gmatthew).

Comment: This district court opinion preceded the Second Circuit's decision in *Polanco* (*see* next case) which apparently created a different rule for determining when the six-year limitation period begins to run. —*JHP*

Administrative Forfeiture / Notice / Statute of Limitations

- **Three-year statute of limitations applicable to *Bivens* actions is not applicable to action for return of administratively forfeited property based on inadequate notice.**

- **Statute of limitations for actions seeking return of administratively forfeited property based on inadequate notice is 28 U.S.C. § 2401, which allows action to be commenced up to six years from date of accrual of the cause of action.**

- **Second Circuit rules that the six-year statute of limitations under 28 U.S.C. § 2401 does not begin to run for suits alleging inadequate notice of administrative forfeiture until claimant discovers or has reason to discover that his property actually has been forfeited without sufficient notice.**

In August 1996, Plaintiff, a convicted drug trafficker in prison since 1990, filed a *pro se* complaint alleging that the Drug Enforcement Administation (DEA) seized his money on April 4, 1990, and violated his due process rights by failing to provide him notice of the administrative forfeiture proceeding. The district court construed the complaint as a claim for the return of forfeited property under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and without requiring a response from the Government, dismissed the action on the grounds that it was time-barred by the three-year statute of limitations applicable to *Bivens* actions.

On appeal, the **Second Circuit** vacated the district court's dismissal and remanded the case to the district court for further proceedings. The panel pointed out that *Bivens* actions are actions seeking money damages for intentional deprivations of property without due process. The panel found that plaintiff's complaint was not properly construed as a *Bivens* claim because: (1) it was an action against a federal agency rather than against individual agents; and (2) it did not seek money as damages but sought a new forfeiture proceeding or return of the seized money as equitable relief for an alleged deprivation of due process that may have been only negligent. The panel concluded that plaintiff's action was like the cause of action for procedurally deficient forfeitures found in *Boero v. Drug Enforcement Admin.*, 111 F.3d 301 (2d Cir. 1997), and *Weng v. United States*, 137 F.3d 709 (2d Cir. 1998).

The panel pointed out that the applicable statute of limitations for such actions in the **Second Circuit** is 28 U.S.C. § 2401(a), which allows suits against the United States up to six years from the time that the right of action accrues. Significantly, the **Second Circuit** also ruled that Plaintiff's claim "accrued when he discovered or had reason to discover that his property had been forfeited without sufficient notice." The panel pointed out that, although the district court had assumed that the cause of action accrued when the property was seized in April 1990, the precise constitutional violation alleged—the permanent deprivation of property without notice—did not occur until the property actually was forfeited. However, the panel found that it was impossible to determine the date of actual forfeiture from the record before it and remanded the case to the district court for a determination.

The court stated that it appreciated that, if a claimant has six years in which to file his action after discovery of the improper forfeiture of his property, the claimant may sometimes have a total of as much as eleven years post-seizure (including the five years from the Government's discovery of the underlying offense allowed for commencing a forfeiture action under 19 U.S.C. § 1621) to file a complaint. It pointed out, however, that it is in the Government's control to avoid such delays. The court stated that Government compliance with its own policies and the case law governing notices in administrative forfeitures "will tend to foreclose the possibility of a claimant bringing a valid suit to recover property a decade after its seizure." The **Second Circuit** pointed out that

Department of Justice policy (Directive No. 93-4, issued on January 15, 1993) requires notice as soon as practicable and not later than 60 days after seizure, and that the *Weng* decision requires actual, personal notice to incarcerated claimants in a demonstrable and undeniable manner. —*JHP*

Polanco v. U.S. Drug Enforcement Administration, ___ F. 3d. ___, No. 96-2905, 1998 WL 721296 (2d Cir. Oct. 15, 1998). Contact: AUSA William C. Pericak, ANYNA01(wpericak).

Administrative Forfeiture / Rule 41(e) / Notice / Cost Bond

- **Defendant was not entitled to return of seized property or damages for its loss where there were no procedural deficiencies in providing defendant notice of the administrative forfeiture and Defendant failed to file a proper claim.**

- **Seizing agency should have returned defendant's cost bond when defendant failed to file a proper claim.**

Defendant filed a motion, pursuant to Fed. R. Crim. P. 41(e), for return of property that had been seized in 1988. The district court ordered the Government to return all of the requested property to the defendant except for computer and electronic equipment that had been administratively forfeited by the Internal Revenue Service (IRS).

On appeal, the defendant stated, for the first time, that: (1) the only notice of administrative forfeiture that he received was a request for a $2,500 bond; (2) he had mailed the bond in a timely manner; and (3) the bond constituted his claim for the computer and electronic equipment. The Tenth Circuit remanded the case to determine if Defendant had received proper notice of the administrative forfeiture and if he had filed a proper claim.

On remand, the district court reviewed the IRS's records relating to the administrative forfeiture. The records indicated that notice was published in a newspaper and also was mailed to defendant by certified mail with receipt returned. The notice listed the seized property and stated that the defendant could obtain a judicial determination of the forfeiture by filing a claim for the property and a $2,500 cost bond by a specified date. The district court concluded that the records made clear that the Government gave defendant sufficient notice to satisfy both due process and the statutory requirements applicable to administrative forfeitures.

The records also indicated what had happened following the notice. The IRS received the $2,500 cashier's check from the defendant just before the deadline for defendant's filing of a claim and cost bond. The check was accompanied by a letter from defendant's attorney that stated only that the check was "on [the defendant's] account." The IRS assumed the check was intended as the cost bond and forwarded the case to the U.S. Attorney (USA). However, the USA declined to file a judicial forfeiture action because of the property's low value. The IRS then determined that Defendant had never filed a proper claim, and proceeded to forfeit the property administratively. The IRS applied the $2,500 cashier's check as partial payment on defendant's outstanding tax liability.

The court pointed out that 26 U.S.C. § 7325(3) requires both a claim and a cost bond in order to contest an IRS administrative forfeiture in a judicial forfeiture proceeding and that, although the defendant intended the $2,500 check as a cost bond, he had filed no claim. His attorney's letter had failed to state any interest in the seized equipment or even to mention the forfeiture action. Consequently, the district court found that the defendant had not satisfied the statutory requirements for obtaining a judicial determination of the forfeiture and that the IRS properly forfeited the equipment administratively on that basis. Accordingly, the court held that the defendant was not entitled to return of the equipment or any damages for its loss.

In *dicta*, the court added that even if it were to find procedural irregularities in the IRS administrative

forfeiture, it would reach the same result because of the ample, unrebutted evidence in the record that the equipment was used by the defendant in violating the tax laws and was thus properly subject to forfeiture.

The court also ruled that, absent a valid claim, there was no need for a cost bond to secure payment of the costs of a judicial forfeiture. Accordingly, the court concluded that the IRS should have returned the $2,500 cashier's check to the defendant and that the only possible damages to which the defendant might be entitled would be the $2,500 that the IRS failed to return. However, the court stated that it was not convinced that defendant should be permitted to receive money from the Government while he still owes the Government taxes and directed the parties to brief that issue. —*JHP*

United States v. Yung, No. 91-20049-JWL, 1998 WL 709615 (D. Kan. Aug. 17, 1998) (unpublished). Contact: AUSA Annette B. Gurney, AKSO1(agurney).

Final Order of Forfeiture / Appeals / Rule 41(e) / Firearms

- **A preliminary order of forfeiture is final as to the defendant, giving him his one and only opportunity to appeal; a defendant who has an opportunity to appeal from the preliminary order may not appeal from the subsequent entry of a final order of forfeiture.**
- **The district court may amend the order of forfeiture to correct oversights and make clerical changes without having to appoint counsel for the defendant or give him a jury trial; nor may a defendant appeal the entry of clerical changes to the order of forfeiture.**
- **A defendant who loses his direct appeal from an order of forfeiture may not raise the same claims in a Rule 41(e) motion for the return of property.**
- **If the district court lacks a basis for the forfeiture of firearms under federal law, it does not necessarily have to release the firearms to the defendant; instead, the court may release the firearms to a State court that has its own forfeiture action underway.**

Defendant was convicted of drug trafficking and was ordered to forfeit a variety of assets. The **Tenth Circuit** and the Supreme Court both affirmed the criminal forfeiture order on direct appeal. *Libretti v. United States*, 516 U.S. 29 (1995).

While the appeal was pending, Defendant filed a Rule 41(e) motion for the return of certain forfeited property, including currency that had been administratively forfeited, and firearms that were not included in the order of forfeiture at all. Also, while the appeal was pending, the court conducted an ancillary proceeding to entertain third-party claims. At the conclusion of the ancillary proceeding, the court entered a final order of forfeiture. In addition to addressing the third-party claims, the final order made various corrections to the preliminary order. Defendant objected to the entry of the final order on a variety of grounds.

The district court denied Defendant's Rule 41(e) motion and overruled his objections to the final order of forfeiture. Defendant appealed.

In a lengthy but unpublished opinion, the **Tenth Circuit** rejected virtually all of Defendant's claims. First, the court held that, as far as the defendant is concerned, a preliminary order of forfeiture is a final, appealable order. Thus, Defendant's one and only opportunity to appeal an order of forfeiture is to appeal from the preliminary order. In particular, because the defendant has no standing to assert claims on behalf of

third parties, he has no right to oppose or to appeal from the subsequent entry of a final order of forfeiture. Accordingly, the appellate court had no jurisdiction to entertain Defendant's appeal from the final order.

Defendant countered that he had a right to object to the final order to the extent that it amended the preliminary order to include additional property. He noted, for example, that the final order included a GNMA certificate that was not included in the preliminary order. But the court held that the GNMA certificate was the same as one listed in the preliminary order. The only difference was that the court had corrected the registration number on the certificate. Such clerical correction of "oversights," the court held, may be made without having to give the defendant the opportunity to appeal. Nor did Defendant have any right to the appointment of counsel, a jury trial, or any of a panoply of other rights he asserted on the issue of whether the clerical corrections could be made.

With respect to the Rule 41(e) motions, the court held that a motion for the return of criminally forfeited property must be denied on the ground that the defendant's remedy is to take a direct appeal from the forfeiture order. "Federal courts will not revisit an issue that has been finally adjudicated in a prior decision in the same case," the court said.

Defendant argued, however, that his Rule 41(e) motion also applied to certain firearms which were never included in the criminal order of forfeiture. The firearms were not included in the forfeiture order because the district court concluded there was no statutory authority for their forfeiture under federal law. Rather than return them to Defendant, however, the court released the firearms to the State of Wyoming which had a parallel state forfeiture action underway. The appellate panel held that this disposition of the firearms was proper; the absence of federal jurisdiction over the firearms did not automatically entitle Defendant to their return if the district court could lawfully release them to a State court which had its own forfeiture proceeding.

Finally, Defendant's Rule 41(e) motion alleged that certain currency had been administratively forfeited and was therefore not included in the criminal order of forfeiture. The administrative forfeiture was defective, Defendant argued, because he did not receive proper notice. The panel held that because the Government had not briefed this issue on appeal, it was necessary to remand the case to the district court to determine if the notice of the administrative forfeiture was adequate. —*SDC*

United States v. Libretti, ___ F.3d ___, Nos. 97-8039, 97-8044, and 97-8089, 1998 WL 644265 (10th Cir. Sept. 9, 1998) (Table).

Money Laundering / Fugitive Disentitlement

- **A boys' orphanage, in which the boys were subject to physical and sexual abuse, committed fraud when it solicited contributions, making the donated funds forfeitable under the money laundering statute.**

- **District court declines to a draw missing witness inference when a fugitive claimant fails to testify in support of his claim because the existence of a warrant for the witness' arrest was justification for his nonappearance.**

The Government filed a civil money laundering forfeiture action against U.S. bank accounts belonging to a Guatemalan entity that operated an orphanage for boys. The accounts contained the proceeds of the entity's charitable fund-raising activities. The Government alleged that the funds were fraudulently obtained because the U.S. citizen who ran the orphanage abused the orphan boys physically and sexually. The court concluded that since the orphanage solicited Americans for contributions, representing itself as a well-run organization, it committed fraud. Furthermore, because the funds in the U.S. bank accounts represented the laundered proceeds of the fraud, they were subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(A).

The case is a good illustration of the use of the

money laundering statutes to recover the proceeds of a fraud for which forfeiture is not otherwise authorized. It also illustrates the necessity of using civil forfeiture where the perpetrator of the fraud remains overseas, resisting extradition to the U.S. on criminal charges.

The Government initially sought to invoke the fugitive disentitlement doctrine in this case, but the court found the application of the doctrine was precluded by the Supreme Court's decision in *Degen v. United States*, 517 U.S. 820 (1996). The Government then requested that the court draw an adverse inference from the fact that the claimant did not appear to prosecute the claim in the civil case. The court noted that in the Second Circuit, an adverse inference may be raised by a person's failure to appear at a civil trial. But it held that the existence of a U.S. warrant for the claimant's arrest was justification for his non-appearance, so it declined the missing witness adverse inference. —*BB*

United States v. Funds Held in the Name of Wetterer, ___ F. Supp. 2d ___, No. CV-91-0234(ADS), 1998 WL 692423 (E.D.N.Y. Sept. 30, 1998). Contact: AUSA Susan Riley, ANYE12(sriley).

Foreign Bank Accounts / Conversion Action / Personal Jurisdiction

■ **Court dismisses civil action against foreign bank that converted forfeited funds to its own use, where Government did not present sufficient evidence for court to exercise personal jurisdiction over the bank.**

In 1993, John Fitzgerald, money launderer for various drug dealers, pled guilty to RICO and money laundering offenses in the District of Massachusetts. As part of his sentence, the court ordered the forfeiture of the contents of the foreign bank accounts where Fitzgerald had deposited millions of dollars in drug proceeds. Rather than transfer the money to the United States, however, the foreign bank transferred approximately $5 million from the Fitzgerald accounts to the local government in Antigua, and retained over $2 million for its use. When the bank and the Antiguan government refused all requests from the United States for the return of the forfeited funds, the United States filed a civil lawsuit in the U.S. district court in Boston against the bank to recover the $7 million.

The civil action sought to recover the United States' interest in the Fitzgerald accounts under three theories. First, the United States maintained that foreign bank converted property belonging to the United States when it transferred $5 million to the Antiguan government. Second, the United States claimed that foreign bank was unjustly enriched by the amount of funds it retained for its own use in an amount in excess of $2 million. Finally, the United States, standing in the shoes of the original depositor Fitzgerald, asserted that foreign bank breached its contract of deposit with the United States when it failed to return all monies on deposit at the foreign bank on demand.

After briefing and a hearing on jurisdictional issues, the district court dismissed the United States' complaint against Defendant foreign bank for lack of personal jurisdiction. The United States had put forth two bases for personal jurisdiction: (1) under the Massachusetts long-arm statute, the district court had jurisdiction over the foreign bank's intentional and tortious actions in Antigua because the effect of those actions was felt in Massachusetts where the criminal order of forfeiture was entered against Fitzgerald; and (2) under Fed. R. Civ. P. 4(k)(2), the court had jurisdiction because the lawsuit was based on a federal common law cause of action, and there was no one state where Defendant would be subject to personal jurisdiction even though it did business at various places in the United States. The Government also requested the opportunity to support its jurisdictional theories through discovery, but the court held that because the "[G]overnment advanced no theory of jurisdiction that might be supported by limited discovery," there was no basis for personal jurisdiction and dismissed the complaint.

The court first analyzed whether it could assert personal jurisdiction over Defendant foreign bank under the Massachusetts long-arm statute. The United States argued that the conversion of the funds in the

Fitzgerald accounts caused harm within Massachusetts, and because that act was intentionally directed at the United States in Massachusetts, jurisdiction should attach. However, the court found that the United States did not satisfy the "purposeful availment" prong of the analysis. That is, the United States failed to demonstrate that the injury to the United States occurred in Massachusetts. The court reasoned that in conversion cases, the injury to the plaintiff occurs in the place were the property is converted, not the place where the plaintiff is located or where the plaintiff's interest in the property arose.

Additionally, the second part of the pertinent long-arm statute requires that the defendant derive substantial revenue from "goods used or consumed or services rendered in the Commonwealth." The court stated that it is irrelevant that Fitzgerald was a Massachusetts resident, because whatever revenue the bank derived was not from services rendered in Massachusetts. The court held that the United States failed to establish the necessary elements of personal jurisdiction under the Massachusetts long-arm statute, thus failing to carry its burden to show that the court has jurisdiction.

The court then addressed the United States' basis for jurisdiction under Fed. R. Civ. P. 4(k)(2). Rule 4(k)(2) extends nationwide jurisdiction when consistent with due process in cases arising under federal law, if the defendant is not subject to jurisdiction in *any* state. The court first stated that Rule 4(k)(2) applies to all actions arising under federal law, including federal common law. The court then found that not only did the United States have to show that the claim arises under federal common law, but it also had to show that no state is able to exercise personal jurisdiction over the defendant in its courts of general jurisdiction. The court found that the United States made no attempt to establish the latter point. The United States specifically identified seven states in which Defendant had contacts; however, the United States failed to contend that those states' long-arm provisions bar jurisdiction over Defendant.

The court acknowledged that it might have been inconsistent for the Government to argue alternatively that: (1) there was personal jurisdiction based on the Massachusetts long-arm statute; and (2) the defendant did not have sufficient contacts with any state for there to be jurisdiction in any state. But the court stated that there is nothing to prevent the United States from taking inconsistent alternative positions. The United States sought discovery on the issue of constitutional minimum contacts with the United States as a whole. But without at least pleading that no state had jurisdiction, the United States failed to make out the elements of personal jurisdiction under Rule 4(k)(2) that would justify pre-jurisdictional discovery. —*MML*

United States v. Swiss American Bank, ___ F. Supp. 2d ___, 1998 WL 685171, Civ. No. 97-12811-WGY (D. Mass. Sept. 30, 1998). Contact: Attorney Mia Levine, AFMLS, Criminal Division, CRM20(mlevine).

Exclusionary Rule

■ **Failure to advise arrested foreign national of right to contact Consulate under the Vienna Convention for Consular Relations, in the absence of any resulting Constitutional violation, is not a basis to suppress custodial inculpatory statements used in civil forfeiture proceeding.**

A Greyhound bus was stopped at a border checkpoint for a routine immigration inspection. Claimant gave inconsistent statements about his citizenship to the immigration officer and was asked to get off the bus. Although Claimant was released, the immigration officer seized the $69,530 in U.S. currency he was carrying. Two months later, Claimant was arrested in Dallas on heroin smuggling charges. During the custodial interrogation subsequent to his arrest, Claimant confessed that the cash seized two months earlier constituted his payment for recruiting heroin smuggling couriers and to pay for the couriers' services. During the 21 U.S.C. § 881 civil forfeiture action against the currency, Claimant moved to suppress these inculpatory statements because the arresting officers failed to advise Claimant, a Nigerian national, of his rights under the Vienna Convention for Consular Relations.

Initially, the court determined that, under the Vienna Convention, Claimant had a right to be informed of the privilege to contact his Consulate and, therefore, Claimant had standing to contest a violation of the Vienna Convention. Next, the Court rejected a waiver argument because Claimant could not waive a right of which neither he nor the arresting officers were aware. The court also rejected the assertion that Claimant's failure to raise the issue in his criminal trial barred use of the exclusionary rule argument in the civil forfeiture case. Finally, while recognizing the validity of the rule in civil forfeiture proceedings, the court held that implementation of the exclusionary rule was an inappropriate remedy for a violation of Claimant's rights under the Vienna Convention.

The exclusionary rule is a judicial remedy created to safeguard against future constitutional violations; not violations of inferior laws such as treaties. Unless a violation of the Vienna Convention also results in the infringement of rights under the United States Constitution, the exclusionary rule is not triggered. In this case, the interrogation was subsequent to a valid arrest, Claimant was given complete Miranda warnings, Claimant waived his right to counsel, and Claimant freely, knowingly, and voluntarily made the inculpatory statements in question. Thus, the failure to advise Claimant of his right to contact his Consulate did not infringe upon any constitutional rights. Moreover, the agents "satisfied the spirit of the Vienna Convention when they notified the Nigerian Consulate that they had custody of the [c]laimant." —*AJK*

United States v. $69,530 in United States Currency, No. P-97-CA-004, 1998 WL 554231 (W.D. Tex. June 15, 1998). Contact: AUSA David Rosado, ATXWE01(drosado).

Adoptive Forfeiture / State Turnover Order

■ **District court reviews procedural requirements for adoption of state forfeiture action and finds that the Drug Enforcement Administration (DEA) complied in all respects.**

State law enforcement officers seized funds from Plaintiff's house and turned them over to DEA pursuant to a turnover order issued by a state court. DEA sent Plaintiff a notice of forfeiture. When Plaintiff filed a late claim, DEA gave him another 20 days to file a claim. When no claim was filed, DEA declared the funds administratively forfeited pursuant to 21 U.S.C. § 881(a)(6).

Plaintiff then filed suit in state court alleging that the state acted improperly in turning the seized funds over to DEA. He sought their return to the state court. The United States removed the action to federal court. As a threshold matter, the district court found that it had jurisdiction over Plaintiff's suit since he was challenging the procedures used by DEA. It held, however, that its review was limited to ensuring that those procedures comported with DEA regulations and due process. And it dismissed the Department of Justice and DEA as defendants because federal agencies may not be sued.

On the merits of the case, although Plaintiff alleged that the state had not complied with all state statutory requirements for a turnover order, the district court reviewed those requirements and found otherwise, carefully explaining the basis for its finding.

First, the district court held that a federal agency has the right to receive property seized by a state and forfeit it. The matter is treated as though the agency had seized the property on the date of the turnover.

Second, the court reviewed DEA's actions in forfeiting the property and found that it complied with all procedural requirements, including the provision of all the notice to Plaintiff required by the Constitution. DEA had mailed notice to his two residences, served his attorney, and published three times.

Finally, the court held that DEA was not required to provide notice to plaintiff before it took possession of the property, or to provide notice of the turnover proceeding. It declared that a turnover is not a Fifth Amendment taking.

The district court then entered summary judgment for the remaining defendants. —*BB*

Hawkins v. Henderson County, ___ F. Supp. 2d ___, No. 6:97CV62, 1998 WL 707611 (E.D. Tex. Sept. 30, 1998). Contact: AUSA Gregg Arthur Marchessault, ATXET01(gmarches).

Statute of Limitations / Awards for Informants

■ **Federal Circuit holds that claim for monetary award by former drug informant is barred by statute of limitations where informant had knowledge of available awards but did not seek award within limitations period.**

Plaintiff alleged that in 1976 he had furnished information to the U.S. Customs Service (USCS) and the Drug Enforcement Administration (DEA) about a Colombian drug smuggling conspiracy, which resulted in the arrest and conviction of the conspirators, as well as the forfeiture and destruction of the marijuana smuggled. Plaintiff alleged that the agents involved had never advised him of the possibility of an award and that he first learned that he might have a right to claim an informant's award in August 1991. Plaintiff filed a claim for such an award with the USCS and DEA that same month. In 1994, the USCS denied Plaintiff's claim because it had no record of information furnished by him regarding drug smuggling activities, nor were there any records of him or of the drug seizure.

Plaintiff filed a claim in the U.S. Court of Federal Claims challenging the denial by the USCS and DEA of his request for an informant's award. The United States moved to dismiss Plaintiff's complaint due to lack of jurisdiction based on the six-year statute of limitations in 28 U.S.C. § 2501, and the trial court dismissed the complaint on that basis.

The **Federal Circuit** affirmed the trial court's holding that it lacked jurisdiction to consider plaintiff's claims, finding that: (1) the right to claim an informant's award had been provided by statute long before the seizure of marijuana in which Plaintiff was allegedly involved, and citizens are charged with knowledge of U.S. statutes; (2) ignorance of the law is not a ground for tolling the statute of limitations; (3) the record demonstrated that Plaintiff had actual knowledge during the time he allegedly acted as an informant, as evidenced by the fact that he sought informant's awards in other cases involving the seizure of contraband drugs, and even sought congressional assistance in making a claim for an informant's award in 1978; and (4) Plaintiff did not provide any good cause or justifiable reason for his late filing of a claim for an informant's award. —*LAL*

Pomeroy v. United States, No. 98-5041, 1998 WL 670183 (Fed. Cir. Sept. 3, 1998) (unpublished) (Table). Contact: Attorney Steven Gordon, Civil Division, CIV02(sgordon).

Awards for Informants

■ **A promise by government employees to pay a confidential informant a percentage of the value of forfeited property is only binding on the Government if its employee either had actual authority to make that promise, or had "implied actual authority," *i.e.*, when such authority is considered to be an integral part of the duties assigned to the employee.**

Plaintiff appealed from a summary judgment by the U.S. Court of Federal Claims denying her claims for breach of an alleged oral contract for payment of 25 percent of the value of forfeitures arising from her role as a confidential informant. The U.S. Court of Appeals for the **Federal Circuit** affirmed, explaining: "Because none of the government employees with whom [Plaintiff] dealt had 'implied actual authority' to bind the United States in contract, we affirm." Authority to bind the Government is generally implied

when such authority is considered to be an integral part of the duties assigned to a government employee.

The strong dissent pointed out that there was a written agreement even though it did not state what percentage was to be paid to the informant. The agreement was "presented" by Department of Justice agents, signed by the informant, and witnessed by two FBI agents. The dissent stated that the informant should have been permitted to prove up the balance of the agreement by oral testimony. The dissent did not discuss the accepted law that the ability of a federal agent to bind his principal is not coterminous with the ability of other agents to bind their principals. —*BB*

Salles v. United States, ___ F.3d ___, No. 97-5131, 1998 WL 712956 (Fed. Cir. Oct. 14, 1998). Attorney Andrea I. Kelly, Commercial Litigation Branch, Civil Division, CIV02(akelly).

Conflict of Interest

■ **To prove ineffective assistance of counsel, in the absence of satisfying the two-pronged *Strickland* test, a defendant must establish that his attorney labored under an *actual* conflict of interest. A lawyer's interest in obtaining legal fees presents only a *potential* conflict of interest between himself and his client.**

Defendant pled guilty to various drug and money laundering offenses and agreed to the forfeiture of certain property. After sentencing, Defendant filed a section 2255 motion attacking his conviction and sentence, claiming ineffective assistance of counsel. Defendant's argument was that his attorney labored under a conflict of interest because his expectation to obtain payment of his legal fees led him to conceal from the Government and the court the location of forfeitable funds held by Defendant in a Swiss bank account. Defendant claimed further that upon the Government's discovery of the funds, his attorney arranged for their transfer to the United States and entered into an agreement that allowed some of these funds to be used for the payment of legal fees.

The magistrate judge submitted a proposed finding that Defendant had not met the two-prong test for ineffective assistance set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires proof of the following: "that counsel's representation fell below an objective standard of reasonableness;" and "that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different."

Upon review of the proposed finding, the district court agreed that the defendant did not meet the two prongs of the *Strickland* standard, but noted that the defendant need not satisfy the two-prong test if he could show that his attorney had an "actual conflict" of interest. To establish an "actual conflict," a defendant must show that his counsel advanced his own (or another client's) interest to the detriment of the defendant. It is the competition between these interests, and not the independent failure of the attorney, the court said, that gives rise to the conflict.

Nevertheless, the court held that a lawyer's interest in assuring payment of his fees creates only a potential conflict, and that the presumption is that counsel will subordinate his own pecuniary interest to honor the interests of his client. As the defendant did not establish an actual conflict, the court approved and adopted the recommendation proposed by the magistrate judge, and denied defendant's 2255 motion. —*WJS*

United States v. Zhadanov, Crim. No. A-93-240-3, 1998 WL 633698 (E.D. Pa. Aug. 11, 1998). Contact: AUSAs Pamela Foa, APAE12(pfoa), and Paul Gray, APAE12(pgray).

Quick Notes

■ Excessive Fines / Summary Judgment

Claimant was apprehended after evading Customs inspectors at the U.S.-Canadian border. He was found to be smuggling over $400,000 worth of diamonds and other jewelry, coins and precious stones. The Government filed a civil forfeiture action under 19 U.S.C. § 1436(b) and moved for summary judgment. The district court denied the motion on the ground that *United States v. Bajakajian*, ___ U.S. ___, 118 S. Ct. 2028 (1998), applies to forfeitures for smuggling offenses, and that a trial was required to determine if the forfeiture was "grossly disproportional to the gravity of the offense." One of the matters to be determined at trial, the court said, was whether the claimant owed duty on the goods, and if so, how much.

United States v. 847 Pieces of Jewelry, No. C98-68WD (W.D. Wash. Oct. 8, 1998) (unpublished). Contact: AUSA Richard Cohen, AWAW01(rcohen).

■ Pre-Judgment Interest

The district court ruled that the Government lacked probable cause for the seizure of $40,000, and ordered the return of the money plus all interest accrued from the moment of seizure. The Government opposed the portion of the order involving pre-judgment interest on sovereign immunity grounds, but the court, following recent cases in the Sixth and Ninth Circuits, ruled that ordering the Government to disgorge interest that it had earned on seized property did not require a waiver of sovereign immunity.

United States v. $40,000 in U.S. Currency, No. CIV-97-1911 (SEC), 1998 WL 643818 (D.P.R. Sept. 1, 1998). Contact: AUSAs Jackie Novas, APR01(jnovas), and Isabel Munoz-Acosta, APR01(imunoz).

■ Motion for Return of Seized Property

Defendant moved for the return of administratively forfeited property on the ground that, subsequent to the administrative forfeiture, the criminal charges against him were dropped. The district court denied the request, ruling that "asset may be civilly forfeited even though the criminal charge related to the seized assets is dismissed."

Bye v. United States, No. 94-CIV-5067 (DLC), 1998 WL 635546 (S.D.N.Y. Sept. 16, 1998).

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